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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 410

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR KEVIN J. RYAN, ET AL.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio.

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TABLE OF CONTENTS.

Opinions Below	1
Statement of Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
How Federal Questions Presented	9
Reasons for Granting the Writ	11
Pre-emption Questions	11
(a) State vs. State and Federal vs. State conflicts developing	12
(b) Foreign policy and Constitution guarantees	15
(c) This is not an *Incres* case	8
(d) State Court's premature assumption invalidates arrest order	19
Free Speech and the Right to Protest	22
Conclusion	23
Appendices:	
A. Opinion, Supreme Court of Ohio	25
B. Opinion, Court of Appeals	26
C. Opinion, Judge Fess, concurring	28
D. Entry, Court of Appeals	30
E. Revised Code of Ohio	32

TABLE OF AUTHORITIES.

Cases.

A. F. L. v. Swing, 312 U. S. 321 22

Bakery Drivers Local v. Wohl, 315 U. S. 769 22

Cafeteria Union v. Angelos, 320 U. S. 293 22

Canopus Transoceanic Corporation of Monrovia v. Seafarers' International Union of North America, et al., No. 7633, 29th Judicial District Court, Parish of Saint Charles, Louisiana, unreported 14

Construction & General Laborers' Union, Local 438, v. Curry, 371 U. S. 542 15

George, Ex parte, 371 U. S. 372 ..... 11, 15, 19

Green, In Re, 369 U. S. 689 ..... 7, 11, 15, 19

Incres Steamship Co. v. International Maritime Workers Union, et al., 372 U. S. 24 ..... 12, 13, 14, 15, 16, 17, 18, 24

Local 100, United Association of Journeymen & Apprentices v. Borden, No. 541, ... U. S. ..., 83 S. Ct. 1423, 53 LRRM 2322 ..... 12, 21

Local 207, International Association of Bridge, Structural & Ornamental Iron Workers Union, et al., v. Perko, No. 482, ... U. S. ..., 83 S. Ct. 1429, 53 LRRM 3227 ..... 12, 21

Madden, Ross M., Regional Director, v. Grain Elevator Flour & Feed Mill Workers, Civil No. 63-C-804, N. D. Ill., E. D. 13, 15

Marine Cooks & Stewards v. Panama Steamship Co., 362 U. S. 365 8

Marine Engineers Benefit Ass'n v. Interlake Steamship Co., 370 U. S. 173 (1962) 12, 15, 16

Marlindo Company v. Seafarers' International Union of North America, 52 LRRM 2820 14

McCulloch v. Sociedad Nacional de Marineros, 373 U. S. 10 ..... 12, 13, 14, 15, 16, 17, 18, 24

New York, New Haven & Hartford Rd. Co., 350 U. S. 155 ..... 8, 11, 16, 18

Plumbers Local, etc. v. County of Dorr, 359 U. S. 354 ..... 8, 11, 16, 18

San Diego Building Trades Council v. Garmon, 359 U. S. 236 ..... 16, 21

Senn v. Tile Layers' Protective Union, 301 U. S. 468 22

Teamsters Local v. Vogt, 354 U. S. 284 23

Thornhill v. Alabama, 310 U. S. 88 22

Upper Lake Shipping, Ltd. v. Seafarers' International Union of Canada, et al., 52 LRRM 2495 13

Constitution.

Constitution of the United States:

Article VI 3

Amendment I 3

Amendment XIV, Sec. 1 3

Statutes.

Ohio Revised Code:

Section 2705.02 ..... 4, 32

Section 2727.02 ..... 4, 9, 32

Section 2727.03 ..... 4, 9, 32

Section 2727.06 ..... 4, 33

28 U. S. C. 1257(3) 1

Labor-Management Relations Act of 1947, as amended (29 U. S. C. 141 *et seq.*):

Sec. 7 ..... 2, 3, 7, 12, 20, 21

Sec. 8 ..... 2, 3, 8, 12, 17, 18, 20, 21

Sec. 10(a) 3

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PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio.

Petitioners herein[1] pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered on May 1, 1963.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported in 174 O. S. at page 461. The opinion of the Ohio Court of Appeals is unreported. The opinions of both courts are printed in the Appendix hereto.

STATEMENT OF JURISDICTION.

The judgment of the Supreme Court of Ohio was entered as of May 1, 1963. There was no motion for a rehearing.

By order of this Court by Mr. Justice Black, the time in which to file this petition was extended to August 30, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3), inasmuch as the Ohio courts have denied the petitioners rights and privileges under federal

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[1] Kevin J. Ryan, Wayne Korb, Richard J. Haskin, George Gould, Rance Best, Gerry Dunn, and Joe Edward Salesbery.

statutes specifically set up and claimed and have also denied rights and claims of the petitioners guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED.

In any effort to prohibit peaceful free speech picketing by American unionists at the berth of a foreign flag ship, is initial jurisdiction in the National Labor Relations Board or in a state court, where the picketing results in the refusal of union employees of an American employer to operate tugs to service the foreign vessel?

Who is to make the initial determination whether an activity being carried on by American unionists (protest picketing at the berth of a foreign flag ship as distinguished from organizational picketing) is arguably protected or prohibited by Sections 7 and 8 of the Labor-Management Relations Act of 1947, as amended—the National Labor Relations Board or a state trial court?

Does a state court have jurisdiction to issue an injunction to the exclusion of the National Labor Relations Board, *without a hearing of any kind*, prohibiting peaceful picketing of a foreign flag ship by American unionists protesting the loss of jobs by fellow unionists (not in an attempt to organize the seamen aboard the vessel or to induce them to leave their jobs) and cause the arrest of pickets on contempt charges where the picketing results in a refusal by other American unionists employed by a tug operator to maneuver the foreign vessel in the harbor?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved are those portions of Section 1 of the 14th Amendment to the Constitution of the United States which read as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" and
>
> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And that portion of Article VI of the United States Constitution which reads as follows:

> "* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in Constitution or Laws of any State to the Contrary notwithstanding."

And that portion of the 1st Amendment to the United States Constitution which provides that:

> "Congress shall make no law * * *; abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, * * *."

The statutory provisions involved in this case are those contained in Sections 7 and 8 (157 and 158) of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. 141 et seq., and that portion of Section 10(a) (160) of the Act which reads as follows:

> "The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce.

This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *"

Sections 2705.02, 2727.02, 2727.03 and 2727.06 of the Revised Code of Ohio, as they pertain to this case are set out in the Appendix.

STATEMENT OF THE CASE.

On May 15, 1962 Upper Lakes Shipping, Ltd., a Canadian ship owner, filed a petition in the Court of Common Pleas of Lucas County, Ohio in Toledo, seeking an injunction against practically everyone connected with the American labor movement, including attorneys representing anyone who might come within the orbit of the proposed injunction. (R. 15.)

The injunction sought to enjoin all picketing, peaceful or otherwise, which might be directed toward anybody and everybody who might work for, be associated with or do business of any kind to any extent with the plaintiff.

On the basis of this petition and an affidavit by a representative of the shipping company, the Court of Common Pleas, *without a hearing of any kind*, assumed jurisdiction of the subject matter and issued an injunction immediately upon the filing of the case in that court. (R. 38.)

The order issued by the court was a temporary injunction, *not a restraining order pending a hearing* on an application for a temporary injunction.[2]

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[2] Under Ohio law, to issue an injunction at the start of an action, the court must necessarily determine that it has jurisdiction to grant the relief sought. (R. C. Sec. 2727.02 and Sec. 2727.03.) A restraining order as provided in Ohio law, on the other hand, is a status quo order for the purpose of preserving existing conditions pending a hearing on a motion for a temporary injunction. (Sec. 2727.06 R. C.)

Three days after the issuance of the temporary injunction, written charges of contempt were filed with the court by an agent of the company. (R. 41.) The act of contempt charged was that unknown persons had engaged in picketing in the vicinity of a ship owned and operated by Upper Lakes Shipping, Ltd. This picketing was conducted in the Maumee River where the pickets were carried in small boats. They displayed signs stating (R. 42):

"I. B. U., AFL-CIO, PROTEST UPPER LAKES SHIPPING LOCKOUT OF S. I. U. OF CANADA. NO DISPUTE WITH ANY OTHER EMPLOYER."

The Inland Boatman's Union, on whose behalf the petitioners were carrying on peaceful protest picketing, was not a defendant in the original injunction action filed by Upper Lakes.

The claim was made that by reason of the original picketing as well as the display of the aforesaid sign by those picketing in the boats in the vicinity of the Upper Lakes' ship, a secondary boycott resulted in that employees of the Great Lakes Towing Co., an American company employing members of American unions, refused to perform any work for their employer in connection with the maneuvering, assisting, docking and loading of the Upper Lakes' ship then the object of the protest picketing in the Maumee River. (R. 22, Par. 16.)

When the company-initiated contempt charges were filed alleging that unnamed persons were violating the ex parte injunction issued three days before, the court, in another ex parte proceedings, issued John Doe warrants which resulted in the arrest of the petitioners. (R. 43.)

Both the original petition for injunction and the written charges of contempt, with their appended affidavits raised at the very least an arguable question whether the disputed activity was such as to place original jurisdic-

tion in the National Labor Relations Board. This is so because the activity on the part of the American unionists was not to induce the personnel aboard the ship to leave or remain away from their jobs.

The activity on the part of the American unionists resulted only in the refusal of other American unionists (employees on the tug boats) to cross the picket lines being maintained by the protesting American unionists to service the Canadian ship. (R. 42, Par. 4 & 5.)

For carrying on this protest picketing in this manner and with this result, the petitioners were arrested by the Respondent Sheriff while they were cruising in the Maumee River in the vicinity of the ship "James Norris."

Pursuant to conditions set down by the court when the John Doe warrants were issued, the Sheriff transferred custody of the petitioners from himself to sureties, with instructions that they be produced in the Court of Common Pleas on May 21, 1962. On that day the petitioners did appear and two motions were made by their counsel and read into the record. (R. 43.)

The first motion was for the dismissal of the charge of contempt for the reason that it was based on an order made by the court in the proceeding in which the court did not then have jurisdiction of the subject matter. (R. 39, 46.)

The second motion was also for the dismissal of the contempt charges and was predicated on the premise that the charge filed showed on its face that the individuals involved were doing nothing more than exercising rights guaranteed them under the 1st and 14th Amendments of the Constitution of the United States, i.e., merely exercising their right of free speech in carrying a sign which proclaimed only that "I.B.U., AFL-CIO, PROTESTS * * *." while riding in a boat on the Maumee River. (R. 90, 50.)

In order to give counsel for the petitioners an opportunity to support these motions with a law memorandum, the court continued consideration of the motions until May 24th.

On May 24th, at the conclusion of oral arguments, the court overruled these motions, saying: "* * * I have jurisdiction for all purposes to go ahead and try the case." (R. 98.) Then, without proceeding to hear the charges against the petitioners, the case was again continued.

The next day the petitioners filed a petition for a writ of habeas corpus in the Court of Appeals of Lucas County. This petition for certiorari stems from the filing of that petition. (R. 1.)

The Court of Appeals of Lucas County ordered the release of the petitioners on the authority of *In Re: Green*, 369 U. S. 689. On the record before it, the court said, the activity involved in the case was arguably subject to the jurisdiction of the National Labor Relations Board in the first instance. (For the finding of the Court of Appeals, see Appendix hereto.)

Apropos of the Court of Appeals finding that the record before it presented an arguable situation as to initial jurisdiction, the record which was before the Court of Appeals disclosed these facts:

(1) The conduct of the petitioners in their protest picketing was entirely peaceful.

(2) Upper Lakes, through wholly owned subsidiaries, engaged in interstate commerce by hauling cargo between ports within the United States, according to reports filed with the National Labor Relations Board by one of its Regional Directors. (See Record at pages 82 and 83.)

(3) The activity complained of was arguably, if not absolutely, a protected activity under Section 7 of the

Labor-Management Relations Act of 1947, as amended (U.S.C. Sec. 151 et seq.) or arguably within the prohibitions of Section 8 of the Act.

(4) The protest (publicity) picketing resulted in the refusal of employees of a supplier of Upper Lakes to work behind the picket line. (R. 42, par. 5.)

(5) Only a full hearing would disclose whether the conduct was protected and permissible as in *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U. S. 365, or prohibited by Section 8 of the Labor Act, at the time the injunction was issued, or fell within the rulings of this Court in *New York, New Haven R. R. et*., 350 U. S. 155, and *County of Dorr, etc.*, 359 U. S. 354.

On the basis of the facts in the record before it, the Court of Appeals made a determination that in assuming jurisdiction over the subject matter and in issuing an ex parte injunction, the court acted beyond its jurisdiction, the court saying, at page 10 of the Record:

> "* * * It appearing further from the record in said cause 192,414 that petitioners are being held on bond for their appearance in said Common Pleas Court on charges of contempt for violation of the temporary order of injunction issued by said court on May 15, 1962; that the aforesaid order of said court is illegal and void; that the petitioners were unlawfully arrested and are now constructively unlawfully imprisoned and restrained of their liberty; and that the National Labor Relations Board has the primary jurisdiction of said dispute. It is therefore adjudged and decreed that the petition of the petitioners is granted, and it is further ordered that the petitioners, * * * are released and discharged from arrest, imprisonment and restraint."

The habeas corpus proceedings in the Court of Appeals being an original action, an appeal to the Supreme

Court of Ohio followed as a matter of right, where, in a one paragraph per curiam opinion rendered on May 1, 1963, that court reversed the judgment of the Court of Appeals and rendered final judgment for the Appellant Sheriff, saying:

> "On February 18, 1963, the Supreme Court of the United States held that the National Labor Relations Board does not have jurisdiction over maritime operations of foreign flagships employing alien seamen. McCulloch et al., National Labor Relations Board, v. Sociedad Nacional de Marineros de Honduras, U. S. , 9 L. Ed. (2d), 547; Incres Steamship Co., Ltd., v. International Maritime Workers Union. U. S. , 9 L. Ed. (2d), 557." (Opinion set out in Appendix.)

HOW FEDERAL QUESTIONS PRESENTED.

The question of the state court's jurisdiction was necessarily raised on the presentation of a petition for injunction to the court in chambers. Under Ohio law (Sec. 2727.02 and 2727.03 R. C.) the court could not issue an injunction at the beginning of the action unless the court determined that it appeared by the petition that the plaintiff was entitled to the relief demanded, viz: an injunction restraining peaceful protest picketing.

The state court, upon the presentation and consideration of the petition ex parte, then had to determine whether jurisdiction was in the state court or was in the area pre-empted by reason of the Labor-Management Relations Act of 1947, as amended.

This same basic question, i.e., state v. federal jurisdiction, was necessarily before the court in the presentation of, and at the ex parte hearing on, the written charges of contempt filed by the plaintiff which resulted in the issuance of John Doe warrants for the petitioners.

At the first opportunity following the issuance of the ex parte injunction order and the arrest of petitioners, they raised the question of lack of state court jurisdiction over the subject matter. This was at the court session of May 21, 1962 where, in oral motions made and read into the record, counsel for the petitioners argued that before assuming jurisdiction of the subject matter and issuing the temporary injunction, the trial court should have deferred to the jurisdiction of the National Labor Relations Board for a determination by it whether the disputed activity was a matter within its exclusive jurisdiction.

The federal questions were again raised and presented as the basis for the petition for a writ of habeas corpus filed in the Court of Appeals of Lucas County.

On appeal to the Supreme Court of Ohio, the only question before the court was that of state vs. federal jurisdiction.

REASONS FOR GRANTING THE WRIT.

This case involves two fundamental problems which are vital parts of the federal labor policy. The first concerns the reoccurring problem of state vs. federal jurisdiction.

The second very basic and important problem involved in this case concerns the right of American unionists to protest by means of peaceful picketing even though the protest picketing is conducted at or near the berth of a foreign flag ship.

PRE-EMPTION QUESTIONS.

This case demonstrates again the refusal of the Ohio courts to recognize, or comprehend, the doctrine of federal pre-emption of jurisdiction over labor disputes which affect interstate commerce. Ohio trial courts, with the approval of the Ohio Supreme Court as in this case, continue to assume jurisdiction and issue *ex parte labor dispute injunctions* even though the controversy *is not one which is clearly intrastate* in character.

The state trial court in assuming jurisdiction in this case and issuing an injunction ex parte when the petition on its face raised questions of whether the activities involved were either protected or prohibited under Section 7 and/or 8 of the Act ignored this Court's then recent decisions in *Green, supra*, and *Ex parte George*, 371 U. S. 372 as well as its earlier decisions in *New York, New Haven, etc., supra*, and *Plumbers Local, etc. v. County of Dorr, supra*.

Stripped of its unnecessary wordage, the petition for injunction filed in the trial court alleges as its principal ground for injunctive relief that by reason of the protest picketing by American unions, employees of an American towing company refused to afford services to the foreign vessel.

If the claims of the plaintiff are true, it would seem to follow that the conduct complained of could come squarely within Section 8 (b) (4) (i) (B) of the Act. This fact together with Section 10 provisions would vest exclusive jurisdiction in the National Labor Relations Board to prohibit unfair labor practices committed by labor organizations.

Despite the efforts of the plaintiffs in the original action to portray the issues as non-domestic and exclusively foreign, that a National Labor Relations Board hearing was required to determine that fact along with others possibly within Section 7 or Section 8 is made clear in *Marine Engineers Benefit Ass'n v. Interlake Steamship Co.*, 370 U. S. 173 (1962), and the 1963 decisions in *Local 100 etc. v. Borden*, and *Local 207 etc. v. Perko, infra.*

The problems which are inherent in this case are not confined to the inability or refusal of the Ohio courts to grasp the significant factors involved in the doctrine of federal pre-emption.

(a) State v. State and Federal v. State Conflicts Developing.

Even before this Court's decisions in *McCulloch vs. Sociedad Nacional de Marineros*, 373 U. S. 10, and *Incres Steamship Co. vs. International Maritime Workers Union, et al.*, 372 U. S. 24, conflicts were developing within the several States involving the very same issues which are present in this case. There is no indication that *McCulloch* and *Incres* have resolved the conflicts which began to develop prior to these decisions. In fact, it appears that conflicts have now begun to develop in decisions in the federal courts and those of the courts of the several States on the issue of state vs. federal jurisdiction.

Wisconsin, in addition to Ohio, has taken the position that where a foreign flag vessel is picketed, state courts have jurisdiction without the necessity of an initial determination being made by the National Labor Relations Board. The Wisconsin case, decided prior to *McCulloch* and *Incres*, is *Upper Lake Shipping, Ltd. vs. Seafarers' International Union of Canada, et al.*, 52 LRRM 2495.

The Court of Appeals of Cuyahoga County, Ohio, in an action brought by an American union to prohibit the exercise of jurisdiction by the Court of Common Pleas of that county, refused relief solely on the basis of the decision of the Supreme Court of Ohio in this case, thus approving state court jurisdiction in the Cleveland action.

The basic facts before the Court of Appeals in Cleveland and the Court of Appeals in Toledo in this case were the same and the issues, that is, state vs. federal jurisdiction, were identical.

The conflict developing between federal and state court decisions since *McCulloch* and *Incres* is best illustrated by the action of the Chicago Regional Director of the National Labor Relations Board, with a strong assist from the United States Department of Justice. The Director who sought and obtained injunctive relief in the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *Ross M. Madden, Regional Director, v. Grain Elevator Flour & Feed Mill Workers*, Civil No. 63-C-804.

The Illinois action was identical to the Wisconsin and Ohio actions in that vessels of Upper Lakes Shipping, Ltd. were involved. American Unions in Chicago placed a picket line wharf side where a Canadian vessel was at anchor. Other American unionists, because of the picketing, refused to cross the picket line to load the Canadian

vessel with grain. The picketing there, as in Ohio, was protest picketing and peaceful.

The defendants in Illinois claimed that the National Labor Relations Board did not have jurisdiction to entertain the unfair labor practice complaint sought to be enforced in the federal court on the basis of the holdings in *McCulloch* and *Incres*.

Also decided after *McCulloch* and *Incres* was *Marlindo Company vs. Seafarers' International Union of North America* in the King County Superior Court in the State of Washington. The decision is reported in 52 LRRM 2820. There the court held that it did not have jurisdiction of an action brought by a foreign shipping company against an American union to enjoin picketing because, the court said, the union conduct sought to be enjoined involves unfair labor practices under the Labor-Management Relations Act. The case, the court held, falls within the preemptive field of the Act.

The court bottomed its decision on the proposition that the provisions of the Act open the doors of the Labor Board to "any person," which includes foreign shippers, to prevent or halt unfair labor practices by American unions which affect commerce.

Also after *McCulloch* and *Incres* was the case of *Canopus Transoceanic Corporation of Monrovia vs. Seafarers' International Union of North America et al.*, No. 7633 on the docket of the 29th Judicial District Court, Parish of Saint Charles in the State of Louisiana, unreported. In that case an American union peacefully picketed a vessel owned by a Liberian corporation flying a Greek flag carrying a foreign crew as it lay at dock in Louisiana. The picket signs protested that the company owning that ship carried cargo to Cuba. They further protested that

the ship was controlled by a family who had failed to and refused to live up to a union contract.

The Union in that case raised the pre-emption question and the plaintiffs countered with the *McCulloch* and *Incres* decisions. That court, on the basis of *Ex parte George*, 371 U. S. 72, to which there could now be added *Construction & General Laborers' Union, Local 438, vs. Curry*, 371 U. S. 542; *In Re: Green*, 369 U. S. 689; *Marine Engineers' Beneficial Association vs. Interlake Steamship Co.*, 370 U. S. 173, held that "peaceful picketing, be it stranger picketing," is arguably protected or prohibited by the Act, and this in itself is sufficient to pre-empt the jurisdiction of this Court to examine the issue and "determine whether or not there is a labor dispute."

The speed with which the courts of the various states and federal districts are creating conflicting decisions would indicate that unless and until this Court comes to grips with the issues inherent in this case, i.e., the right of American seamen to protest loss of jobs through the flight of American capital to foreign countries and its return to this country under foreign flags as distinguished from picketing to become the representative of the seamen aboard the ship, the concern of foreign governments and the United States over the tensions created by situations such as those involved here will continue unabated.

(b) Foreign Policy and Constitutional Guarantees.

The foreign policy considerations which were urged upon this Court in *McCulloch* and *Incres* and reasserted again in the United States District Court of Illinois in *Madden vs. Grain Elevator etc., supra*, are, to be sure, of importance but, we suggest, do not and cannot be permitted to supersede guarantees made to American citizens by our Constitution and legislative enactments.

In *McCulloch*, which was the basis for the Court's holding in *Incres*, the Court emphasized that:

> "the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolutions of the controversy over the Board's power."

This immediately raises the question whether *McCulloch* and *Incres* mean that controversies between American citizens and foreign commercial enterprises which might affect this country's relations with foreign governments are better left, from the outset, to the various courts of the fifty (50) states rather than to the one agency established by Congress for the purpose of maintaining a uniform labor policy and from which there is a direct access to the federal courts.

This raises the question, too, whether *McCulloch* and *Incres* were intended to dilute *Garmon* and subsequent cases which left the question of determination of jurisdiction in the first instance to the Labor Board, *i.e.* as in *Marine Engineers Benefit Assn. vs. Interlake Steamship Co.*, 370 U. S. 173 (1962) which, following the holdings of the court in *New York, New Haven & Hartford Railroad Co.* (the piggie-back case) *supra*, and *County of Dorr, supra*, emphatically said:

> "while the Board's decision is not the last word, it must assuredly be the first."

This case, then, presents a very pertinent question: Is state vs. federal jurisdiction to be determined at the outset merely by the flag said to be flying at the top of a mast and/or by the untested and self serving allegations contained in a state court petition to enjoin activities which the plaintiff claims have resulted in a secondary boycott?

In other words, who in the first instance is to decide: whether the ship in such a situation is under foreign registry; that the seamen are aliens; that the ship does not engage in commerce between ports within the United States; the objectives of the picketing; whether the activity by the Americans result in a secondary boycott; and if so, whether the activity is prohibited by Section 8 of the Act; other questions germane to jurisdiction?

While we have no quarrel with *Incres* and *McCulloch* insofar as they hold that federal jurisdiction must yield where the object of the activity in question relates to an attempt by American Unions to organize foreign seamen aboard foreign flag ships, we believe the law is, and should be so declared, that *until* the National Labor Relations Board makes an initial determination that it does not have jurisdiction, state courts do not have jurisdiction over the subject matter and consequently any acts taken or orders made are void.

It may well be that Congress did not intend that the internal affairs of foreign vessels be subject to the jurisdiction of the National Labor Relations Board. A far different matter, however, presents itself when a labor dispute occurring in an American port and involving a foreign vessel creates an unfair labor practice affecting American employees of an American employer engaged in commerce or in an industry affecting commerce. Such conduct on American soil should be subject to the unitary regulation of the National Labor Relations Act as effectuated by the National Labor Relations Board. To hold otherwise would mean that illegal conduct committed by American Unions affecting American employees of American companies which occurs on American soil would, simply because a foreign vessel is involved, be left to the jungle of local rule and consequent inconsistent regulation which Con-

gress so earnestly sought to avoid in the passage of the Labor Management Relations Act.

But until this Court finally resolves the issue of whether or not the National Labor Relations Board has jurisdiction to adjudicate such matters, both the Board and the State Courts will continue to apply disparate and, no doubt, inconsistent relief to the same subject matter.

(c) This Is Not an Incres Case.

In *Incres* the court distinguished its decision there and its decision in *New York, New Haven & Hartford Railroad Co.*, 350 U. S. 155. Situations such as we have in this case are, we believe, governed by *New York, New Haven & Hartford Railroad Co.* and by *Plumbers Local 298 vs. County of Dorr*, 359 U. S. 354, rather than by *McCulloch* and *Incres*, as the Ohio courts are now holding.

In *New York, New Haven & Hartford Railroad Co.* and *County of Dorr* this Court held that since both railroads and political subdivisions are not excluded from the Act's definition of "person," both were entitled to the Labor Board's protection from the kind of unfair labor practice proscribed by Section 8(b)(4). This result, the Court held, would effectuate Congressional policies of uniform control over labor abuses and protection of the parties injured by such practices.

In like manner, the definition of "person" in the Labor Relations Act does not exclude foreign vessels manned by alien seamen. In fact, *Upper Lakes Shipping, Ltd.* effectively used the machinery of the National Labor Relations Board in Case No. 18-C-108 in another phase of a dispute it has had with American unionists. In that instance the National Labor Relations Board did assert jurisdiction and charged the *Seafarers' International Union of North*

America with committing a secondary boycott in the United States District Court, Western Michigan, Case No. Civil 809.

(d) State Court's Premature Assumption of Jurisdiction Invalidates Arrest Order.

While the jurisdictional aspect of this case generally involves the question of state vs. federal jurisdiction, of immediate concern to the petitioners is the question whether they can be cited and arrested on the charge of violating a temporary injunction issued by a court where no hearing of any kind was held to determine whether the controversy was arguably or potentially protected or prohibited by the provisions of the Labor Act—cited and arrested by a court which did not then have jurisdiction.

It would seem that there can be no question since this Court's decisions in *In Re: Green*, 369 U. S. 689, and in *Ex Parte George*, 371 U. S. 72, that citations and/or convictions for contempt for the violation of injunctions issued by state courts are void where the subject matter of the action falls within the areas pre-empted by the Labor Act. In *Green*, for instance, the Court nullified an alleged contempt because the dispute was arguably subject to the Act, and in *George*, a contempt conviction also arising out of a state court temporary injunction was vacated for the same reason.

If our appraisal of *In Re: Green* is correct, this particular case could be disposed of in the same manner as the court disposed of *George* following its decision in *In Re: Green*. In *George* the Court granted certiorari and reversed in the same order.

In *Green* the court held that it was a denial of substantive due process to cite a person for contempt of court

in an action arising out of a labor dispute affecting interstate commerce without first holding a hearing to determine jurisdiction. In that case Mr. Justice Douglas noted that the dispute arose out of a labor controversy in which an ex parte injunction was issued against peaceful picketing.

In speaking for the court, Mr. Justice Douglas said:

> "The question is whether the state court was trenching on the federal domain. The issue thus tendered emphasizes one important function that a hearing performs."

Mr. Justice Douglas then went on to say:

> "It is impossible to determine from this record whether or not this dispute was exclusively within the jurisdiction of the National Labor Relations Board under the principles of San Diego Building Trades Council vs. Garman, 359 U. S. 236, and Amalgamated Association vs. Wisconsin Employment Relations Board, 340 U. S. 383."

Continuing, Mr. Justice Douglas said:

> "The Ohio court could not know whether it was within bounds in citing a person for contempt for violating the injunction without such a hearing. For, as Amalgamated Association vs. Wisconsin Employment Relations Board, supra, held, a state court is without power to hold one in contempt for violating an injunction that the state had no power to enter by reason of federal pre-emption."

Where there are arguable or potential Section 7 and/or 8 questions involved in a controversy brought into a state court, it is still incumbent upon the state court to defer in the first instance to the National labor Relations Board. This, we believe, is the law and it applies in situations involving the protest picketing of foreign vessels by

American unionists. As we have already noted the fact that the vessel flies a foreign flag does not turn a domestic dispute or problem into one beyond the jurisdiction of the Labor Board and this Court should so hold to avoid further conflict among the courts and governments with which we trade.

That this is so is evident from this Court's latest pre-emption decisions handed down on June 3, 1963 in *Local 100, United Association of Journeymen & Apprentices vs. Borden*, No. 541, ___ U. S. ___, 83 S. Ct. 1423, 53 LRRM 2322, and *Local 207, International Association of Bridge, Structural & Ornamental Iron Workers Union, et al., vs. Perko*, No. 482, ___ U. S. ___, 83 S. Ct. 1429, 53 LRRM 3227, the former case coming out of Texas and the latter case out of Ohio.

Reiterating the position it took in *San Diego Building Trades Council vs. Garmon*, 359 U. S. 236, the Court, speaking through Mr. Justice Harlan, said, among other things:

> "The first inquiry in any case in which a claim of federal pre-emption is raised must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance."

In both *Borden* and *Perko* Mr. Justice Harlan pointed out several possible areas in each case which might or might not come within the provisions of Section 7 and Section 8 of the Act, and in concluding the *Perko* decision he said, referring to some of the possible unfair labor practice questions which might be involved:

> "We do not, of course, intimate any view on the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this

> lawsuit arguably comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State court must yield jurisdiction * * *."

In order to prevent the courts of a great industrial State like Ohio from retrogressing into again permitting the indiscriminate use of the ex parte temporary injunction as a device to break strikes and/or prohibit the exercise of free speech, it is important that this Court once again point out to the Supreme Court of Ohio that ex parte injunctions in labor disputes where the controversy is arguably subject to the provisions of the Labor-Management Relations Act cannot be the basis of citations for contempt and resulting arrest based on violations of these null and void injunctions.

FREE SPEECH AND THE RIGHT TO PROTEST.

The time is right for a re-examination by the Court of reliance upon the free speech provisions of the United States Constitution as justification to engage in peaceful picketing in labor controversies.

Starting with *Senn vs. Tile Layers' Protective Union*, 301 U. S. 468, where the Court said:

> "Members of a Union might, without special statutory authorization by a State, make known the facts of a labor dispute; for freedom of speech is guaranteed by the Constitution."

on down through *Thornhill vs. Alabama*, 310 U. S. 88, and *A. F. L. vs. Swing*, 312 U. S. 321, and *Bakery Drivers Local vs. Wohl*, 315 U. S. 769, and *Cafeteria Union vs. Angelos*, 320 U. S. 293, where the Court broadened the constitutional proscription against the abridgment of freedom of speech by state court injunction against peaceful picketing

and then back again in a reverse direction through a series of cases which carried through *Teamsters Local vs. Vogt*, 354 U. S. 284, all of which resulted in the court restricting somewhat its former holdings, restricted to the point where Mr. Justice Douglas, dissenting in *Vogt*, termed it the formal surrender by the Court. However, even there where the Court granted the right to courts to enjoin peaceful picketing under certain narrow circumstances, the Court held:

> "Of course, the mere fact that there is picketing does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislators, can enact blanket prohibitions against picketing."

"This series of cases," Mr. Justice Frankfurter said in *Vogt*, "* * * established a broad field in which a State, in enforcing some public policy, * * *, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."

Through these cases what has been described as the "objectives" test of the common law gained new life. Using this test requires a uniform policy within the framework of the federal labor law. Who, for instance, is to determine the "objectives" when they are obscure, the National Labor Relations Board or state courts? To have a uniform labor law policy throughout the United States it must be left we believe, to the agency Congress has entrusted these matters—the Board.

CONCLUSION.

We respectfully suggest that this case brings into focus problems vital not only to the individual petitioners who have been arrested and illegally restrained by a court, which at the time it acted, lacked jurisdiction, but

vital to the maintenance of a uniform policy dealing with labor-management relations under federal law.

We earnestly suggest that state courts, particularly the Ohio courts, are misinterpreting this Court's decisions in *McCulloch* and *Incres* and as a result are endangering the stability of the uniform labor policies which previous decisions of the Court have defined as being the intent of Congress.

Only this Court can prevent the States which are inclined to veer back to a provincial approach in matters long since deemed to be national in scope from doing so.

If we are correct in our analysis of the jurisdictional aspects involved in this matter, the Petitioners are entitled to an order reversing the Ohio Supreme Court and be discharged from restraint.

On the basis of the foregoing we sincerely believe that the matters involved in this dispute are of such magnitude as to warrant the allowance of the writ prayed for.

Respectfully submitted,

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APPENDIX.

OPINION OF THE SUPREME COURT OF OHIO.

RYAN ET AL., APPELLEES, *v.* HIRSCH, SHERIFF, APPELLANT.

(No. 37717—Decided May 1, 1963.)

APPEAL from the Court of Appeals for Lucas County.

This cause originated in the Court of Appeals by the filing of a petition in habeas corpus on behalf of seven petitioners, appellees herein.

Charges of contempt of court were filed against the petitioners in an action pending in the Common Pleas Court in which a Canadian shipping concern sought injunctive relief restraining picketing and other interference by Canadian unions with the shipper's operations in the port of Toledo. One charge of contempt alleged that certain of the petitioners were guilty of disobedience of a temporary injunction issued by the Common Pleas Court, and the second charge alleged that certain of the petitioners were guilty of direct ntempt of court for resisting and interfering with officers of the court in the discharge of their duties.

The petitioners were arrested and released on bond pending hearings on the charges, but, upon the filing of the petition in the instant case in the Court of Appeals, proceedings in the Common Pleas Court were suspended and petitioners have not yet been tried for or found guilty of contempt.

After the hearing in the instant case, the Court of Appeals ordered the petitioners released for the reason that the temporary injunction issued by the Common Pleas Court was illegal and void for want of jurisdiction. The Court of Appeals was of the opinion that the National Labor Relations Board has the initial primary jurisdiction of the dispute.

An appeal as of right brings the cause to this Court for review.

Per Curiam. On February 18, 1963, the Supreme Court of the United States held that the National Labor Relations Board does not have jurisdiction over maritime operations of foreign flagships employing alien seamen. *McCulloch et al., National Labor Relations Board, v. Sociedad Nacionale de Marineros de Honduras,* U. S., , 9 L. Ed. (2d), 547; *Incres Steamship Co., Ltd., v. International Maritime Workers Union,* U. S., , 9 L. Ed. (2d), 557.

In view of the foregoing cases, the judgment of the Court of Appeals is reversed and final judgment is rendered for appellant.

MEMORANDUM OPINIONS OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

(Filed: 6/18/62.)

DEEDS, J. Finding that the proceedings in the common pleas court, (being Cause No. 192414 entitled Upper Lakes Shipping Ltd. v. Maritime Trades Department, A. F. L.-C. I. O., et al., in said court) involves numerous U. S. unions and a number of U. S. employers in a labor dispute affecting the movement of ships and the operation of other instrumentalities in interstate commerce, I conclude that the controversy is within the exclusive jurisdiction of the National Labor Relations Board; that the petitioners are (constructively) imprisoned and restrained of their liberty and that the common pleas court is without jurisdiction in said Cause No. 192414 and the proceedings in contempt against the petitioners. *San Diego Building Trades Council, et al., vs. Garmon, et al.,* 359 U. S. 236; *In the Matter of the Petition for a Writ of Habeas Corpus for Merritt W. Green, II, petitioner,* The United

States Law Week, May 22, 1962, 30 L. W. 4380; *Grimes & Hauer, Inc., appellant vs. Pollock, et al., appellees,* 163 Ohio St. 372, 127 N. E. 2d 203; *The Richman Bros. Co., appellant vs. Amalgamated Clothing Workers of America, et al.,* 168 Ohio St. 560, 157 N. E. 2d 101.

FESS, *J.* Finds upon the record of the proceedings in this Court that it is not possible to determine whether or not the dispute which is the subject of the action in the court of common pleas (Upper Lakes Shipping, Ltd. v. Maritime Trade Department, etc., Cause No. 192414) is exclusively within the jurisdiction of the National Labor Relations Board, and further finding that petitioners are constructively illegally restrained pursuant to order of the common pleas court in said cause entered therein prior to a determination by that court by its journal entry that it has jurisdiction of the controversy, the writs should be allowed and petitioners discharged from custody upon authority of *In re Green, supra.*

SMITH, *P. J.* It appearing that the United States Supreme Court by at least a majority thereof in its doctrinaire interpretation of the National Labor Relations Act is unalterably committed to according the N. L. R. B. exclusive pre-emption of jurisdiction in labor matters and pinioned on the adverb, "arguably," I concur in the judgment and defer state court jurisdiction to the "adjudicatory expertise" and "competence" of the N. L. R. B., anticipating that *Benz v. Compania Naviera Hidalgo,* 353 U. S. 138, will be overruled or distinguished on its particular facts so as to render it nugatory, although the facts in the case before this Court are "arguably" similar to the *Benz* case.

SEPARATE OPINION OF FESS, J., COURT OF APPEALS OF LUCAS COUNTY, OHIO.

(Filed: 6/18/62.)

FESS, *J.* There has been brought to our attention the decision of the Supreme Court of the United States in Engineers Assn. v. Interlake Steamship Co., announced June 11, 1962. In order to avoid any misinterpretation of the import of the writer's findings as announced on June 18th, and in the light of the recent decision of the Supreme Court, the writer further finds:

1. That on May 21st counsel for the defendants, in Cause No. 192414 in the common pleas court, orally moved that the action be dismissed on the ground that the court did not have jurisdiction of the cause.

2. The cause was continued for further hearing on May 24th, at which hearing no evidence was received to afford a basis upon which to determine the court's jurisdiction, but after somewhat extended argument of counsel the court announced from the bench that it had jurisdiction of the cause for all purposes and the cause was continued for further hearing upon the citations for contempt. This announcement of the court to date has not been journalized.

In reaching the conclusion that the writs should be allowed the writer is influenced by the language employed in the opinion of the *Green* case:

> "It is impossible to determine from this record whether or not the dispute was exclusively within the jurisdiction of the National Labor Relations Board under the principles of San Diego Building Trades Council v. Garmon, 359 U. S. 236 and Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 383. The Ohio court could not know whether it was within bounds in citing a person for

contempt for violating the injunction without such a hearing."

Contrary to the Ohio rule, the law as stated in the opinion of the Supreme Court is controlling—not the syllabus which is prepared by the writer of the opinion without the concurrence of the other members of the court.

In the opinion of the writer, as was the situation with the Supreme Court in the *Green* case, in the absence of sufficient evidence in the record presented to us in the instant case, we are in no position to determine upon the evidence whether the pending action in the common pleas court involves facts to be distinguished from those presented to the Supreme Court in *Benz v. Compania Naviera Hidalgo*, 352 U. S. 889. Nevertheless, the arrest of the petitioners in the instant case, upon an ex parte order without a hearing and an opportunity to establish that the common pleas court was acting in a field exclusively reserved to the National Labor Relations Board, violated the due process requirements of the Fourteenth Amendment and the petitioners were entitled to be discharged. *Ex parte Green.*

Under the *Garmon* case and the recent *Interlake Steamship* case, no doubt the activity involved in the case below is at least "arguably" subject to the jurisdiction of the National Labor Relations Board to which the common pleas court must defer, but in my opinion, this Court, in the absence of further evidence, should not determine that question at this stage of the proceedings.

With regard to the contention of the respondent that since the petitioners are at large on bond and not in the actual physical custody of the sheriff, *In re Fincher*, 107 Ohio App. 40, the same situation was presented in the *Green* case. In the statement of facts in the opinion of

the Ohio Supreme Court reference is made to the fact that "Green is (constructively) imprisoned and restrained of his liberty in the county jail of Lucas County without legal authority." 172 Ohio St. 269, at page 270. Furthermore, if the arrests were unlawful under the *Green* case the petitioners are entitled to discharge.

Approved:

/s/ LEHR FESS,

Judge.

JOURNAL ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

(Filed: 6/29/62.)

This day came William Hirsch, Sheriff of Lucas County, Ohio, to whom a writ of habeas corpus was directed upon the petition of Kevin J. Ryan, Wayne Korb, Richard J. Haskin, George Gould, Rance Best, Jerry Dunn, and Joe Edward Salesbery, and made his return that the petitioners above named are not in his custody; that said petitioners are not confined in the Lucas County jail and that he cannot produce the bodies of said petitioners as commanded by writ of habeas corpus. It appearing further by written stipulation between counsel for the petitioners and the said sheriff that the petitioners and each of them were, on or about the 18th and/or 19th day of May, 1962, taken into custody by him as Sheriff of Lucas County, Ohio, pursuant to an order of arrest issued by the Court of Common Pleas of Lucas County, Ohio, and that he, as Sheriff, did retain each of the petitioners in his custody pursuant to said orders until released to bondsmen approved by the Court of Common Pleas, Lucas County, Ohio; that the record to be considered by this court in the determination of the issues presented by the

petition for a writ of habeas corpus on behalf of each of the petitioners shall consist of the entire file in Cause No. 192414 in the Court of Common Pleas of Lucas County, Ohio, including, among other things, a certified transcript of a portion of the proceedings held before the Honorable Thomas J. O'Connor of the Court of Common Pleas, which set forth therein the motions for discharge of the petitioners and the court's announcement of his decision thereon overruling said motions.

It appearing further from the record in said Cause No. 192414 that petitioners are being held on bond for their appearance in said Common Pleas Court on charges of contempt for violation of the temporary order of injunction issued by said court on May 15, 1962; that the aforesaid order of said court is illegal and void; that the petitioners were unlawfully arrested and are now constructively unlawfully imprisoned and restrained of their liberty; and that The National Labor Relations Board has the initial primary jurisdiction of said dispute.

It is therefore ADJUDGED and DECREED that the petition of the petitioners is granted and it is further ordered that the petitioners Kevin J. Ryan, Wayne Korb, Richard J. Haskin, George Gould, Rance Best, Jerry Dunn, and Joe Edward Salesbery are released and discharged from arrest, imprisonment and restraint.

Finding that want of jurisdiction in Cause No. 192414, Court of Common Pleas, distinguishes the case before us from *In Re Fincher*, 107 Ohio App. 40, motion to certify record for review and final determination by the Supreme Court is overruled.

Upon consideration of application of respondent for rehearing, the court adheres to its former findings and judgment and the application is denied.

It is ordered that the costs of this proceeding be paid by the county treasurer on warrant of the county auditor therefor as provided by law.

Respondent, Sheriff excepts.

S/ DUDLEY F. SMITH,
Presiding Judge.

REVISED CODE OF OHIO.

Sec. 2705.02. Acts in contempt of court.

"A person guilty of any of the following acts may be punished as for a contempt:

"(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;"

* * * * *

Sec. 2727.02. Causes for an injunction.

"A temporary order may be granted restraining an act *when it appears by the petition that the plaintiff is entitled to the relief demanded*, and such relief, or any part of it, consists in restraining the commission or continuance of such act, the commission or continuance of which, during the litigation would produce great or irreparable injury to the plaintiff, * * *". (Emphasis ours.)

Sec. 2727.03. Courts authorized to grant injunctions.

"*At the beginning* of an action, or any time before judgment, an injunction may be granted by the Supreme Court or a Judge thereof, the Court of Appeals or a Judge thereof in his district, the Court of Common Pleas or a Judge thereof in his county, or the Probate Court in causes pending therein, *when it appears to the Court* or Judge by affidavit of the plaintiff, or his agent, *that the plaintiff is entitled to an injunction.*" (Our emphasis.)

Sec. 2727.06. Notice of application.

"If, in the opinion of the Court or Judge, the defendant or a party to the suit should be heard before granting an injunction, a reasonable notice may be required to be given to such party of the time, place, and purpose of the application for the injunction. Such party in the meantime may be restrained."

* * * * *